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No. 91-724

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ALAN F. GERSMAN, *et al.*,
Petitioners,

v.

GROUP HEALTH ASSOCIATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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QUESTION RESTATED

Whether the termination of a commercial contract is "postformation conduct" as defined in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), and therefore not actionable under 42 U.S.C. § 1981.

STATEMENT REQUIRED BY RULE 29.1

Group Health Association, Inc. has no publicly-owned parent, subsidiaries, or affiliates.

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BRIEF IN OPPOSITION

The court of appeals held that petitioners' claim of discriminatory contract termination is not cognizable under 42 U.S.C. § 1981. Pet. App. 8a-16a. This holding is a correct and unexceptional application of the principles of *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), to the particular facts of this case. It presents no issue that is appropriate for review by this Court.

COUNTERSTATEMENT OF THE CASE

This case involves the termination of a commercial service contract between respondent Group Health Association, Inc. ("GHA") and petitioner Computer Security

International, Inc. ("CSI"). In August 1983, GHA entered into a contract with CSI for the off-site storage and retrieval of GHA's computer tapes. The initial term of the agreement was one year. Thereafter, the contract would automatically renew for successive one-month periods until either party terminated it on thirty days notice. Pet. App. 2a. CSI could adjust the fixed charges under the contract by notifying GHA forty-five days in advance of the change. *Id.* The agreement remained in effect on its original terms (except for price adjustments) until October 1987, when GHA notified CSI that it was terminating the contract.

In the latter part of 1986, Mohammad Ghafori became the operations manager of GHA's Management Operations System. CSI and its president, petitioner Alan Gersman, allege that in August 1987, Adel Nakhla, an assistant to Ghafori, asked Gersman if he was Jewish, to which Gersman answered yes.[1] After this incident, Gersman claims he began hearing rumors that GHA was dissatisfied with CSI's services. In an effort to retain GHA as a customer, Gersman offered to lower the prices in the contract, but GHA declined. On October 6, 1987, GHA terminated its contract with CSI. CSI and Gersman subsequently brought this action against GHA alleging that the contract was "cancelled and not renewed" because Gersman is Jewish, in violation of both § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1990), and § 1-2511 of the District of Columbia Human Rights Act ("DCHRA"), D.C. Code § 1-2511 (1991).

The district court dismissed both counts of the complaint for lack of standing and failure to state a claim. Pet. App. 29a-37a. The court of appeals, while disagreeing that CSI lacked standing (Pet. App. 4a-8a), affirmed

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[1] Contrary to petitioners' suggestion (Pet. 3 n.1), GHA has denied that Gersman's heritage, race, or religion played any part in GHA's decision to terminate CSI's contract. That decision was based solely on the unsatisfactory performance of CSI.

the dismissal of the case on the grounds that Gersman and CSI failed to state a claim under § 1981 or the DCHRA. Pet. App. 8a-18a. With respect to the federal statute, the court agreed with all of the other federal circuits holding that, under *Patterson*, § 1981 does not cover contract terminations. Pet. App. 10a-13a. Applying that principle to the facts before it, the court held that GHA's actions, whether characterized as termination of or failure to renew the contract, were "postformation conduct" as defined in *Patterson*. Moreover, CSI's offer of more favorable price terms to GHA was insufficient to create a "new" contractual relationship under *Patterson*. Pet. App. 13a-15a.[2]

REASONS FOR DENYING THE WRIT

The petition presents no issue worthy of this Court's attention because there is no conflict among the circuits, the decision below was a correct and straightforward application of the law, and the passage of the Civil Rights Act of 1991 has obviated the need for this Court to "restore" protections allegedly lost under *Patterson*.

First, the lower court's decision is completely consistent with the decisions of this Court and all other courts of appeals. *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), held that § 1981's protection of the right to make and enforce contracts "does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." *Id.* at 171. The court of appeals correctly ruled that this language bars claims based on the termination of a contract. Pet. App. 10a-13a. Every court of appeals to consider this issue has agreed. See *Taggart* v. *Jefferson County Child Support Enforcement Unit*, 935 F.2d 947, 948 (8th Cir. 1991); *Trujillo* v. *Grand Junction*

[2] Although petitioners assert that the court of appeals erred in other respects (Pet. 16-17), certiorari has not been requested on those issues (see "Question Presented"), and respondent has not addressed them herein. See Supreme Court Rule 14.1(a).

Regional Center, 928 F.2d 973, 976 (10th Cir. 1991); *Williams* v. *First Union Nat'l Bank*, 920 F.2d 232, 233-34 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2259 (1991); *Prather* v. *Dayton Power & Light Co.*, 918 F.2d 1255, 1256-58 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2889 (1991); *Thompkins* v. *Dekalb County Hosp. Auth.*, 916 F.2d 600, 601 (11th Cir. 1990) (per curiam); *Gonzalez* v. *Home Ins. Co.*, 909 F.2d 716, 722 (2d Cir. 1990); *McKnight* v. *General Motors Corp.*, 908 F.2d 104, 108-09 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991); *Courtney* v. *Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990); *Lavender* v. *V & B Transmissions & Auto Repair*, 897 F.2d 805, 807-08 (5th Cir. 1990).

The lower court properly rejected petitioners' argument that *Patterson* should be limited to the employment context. Pet. App. 9a-10a. Although *Patterson* involved claims of employment discrimination, the ruling is much broader, encompassing any claim under § 1981's "make and enforce contracts" clause. That the decision was intended to apply to all types of contracts is apparent not only from this Court's reaffirmation of *Runyon* v. *McCrary*, 427 U.S. 160 (1976), a nonemployment case, but also from its emphasis on the language of § 1981. *Patterson*, 491 U.S. at 171-78. Nothing in the decision remotely suggests that the phrase "make and enforce contracts" has a different meaning depending on the type of contract under consideration. Further, *Patterson*'s discussion of the potential overlap between § 1981 and Title VII, *id.* at 180-82, was dictum; this Court neither explicitly nor implicitly endorsed the application of a different statutory standard to commercial contracts. The two courts of appeals that have addressed this issue have agreed, concluding that *Patterson* applies equally to employment and commercial contracts. See *Perry* v. *Command Performance*, 913 F.2d 99, 101 n.3 (3d Cir. 1990); *Gonzalez* v. *Home Ins. Co.*, 909 F.2d 716, 723 (2d Cir. 1990).

Second, the decision below correctly applied *Patterson* to the facts presented. After considering the automatic renewal provision of the contract, the ongoing nature of the parties' relationship, the scope of the original agreement, and the proposed modification of the price term, the court concluded that these facts together showed that GHA's actions constituted "postformation conduct" outside the scope of § 1981. Pet. App. 13a-15a. This Court has left undisturbed a host of decisions that turn on the distinction between "formation" and "postformation" conduct. See, e.g., *Hull* v. *Cuyahoga Valley Bd. of Educ.*, 926 F.2d 505 (6th Cir.), *cert. denied*, 111 S.Ct. 2917 (1991) (nonrenewal of employment contract); *Carter* v. *South Central Bell Tel.*, 912 F.2d 832 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991) (discharge); *McKnight* v. *General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991) (recall from indefinite lay-off). Even if, as petitioners claim, *Patterson* has produced "bizarre and nonsensical results" (Pet. 8) and decisions based on "arcane distinctions" (Pet. 11), this is not such a case. The lower court's treatment of the contract issues was straightforward and unimpeachable.

Finally, this case does not raise an important question of federal law because Congress has amended the Civil Rights Act of 1866 to encompass "postformation conduct," including contract terminations. On November 21, 1991, President Bush signed into law the Civil Rights Act of 1991, Pub. L. No. 102-166, 137 Cong. Rec. H9517 (daily ed. Nov. 7, 1991). Section 101 of the Act adds to 42 U.S.C. § 1981 a new subsection (b), which states:

> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

This amendment negates petitioners' chief argument that "review by this Court is necessary to provide guidance to the lower courts and *to restore the protections of § 1981 to commercial and service agreements.*" Pet. 5 (emphasis added). Because § 1981 now explicitly prohibits racially-biased contract terminations, the issue raised in the petition is no longer a live one.

This Court has denied certiorari where, even despite the existence of a conflict, amendment or expiration of the relevant statute eliminated the problem presented by the lower court decision. See Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465, 466-68 (1953) (discussing *United States* v. *Abrams*, 344 U.S. 855 (1952); *Community Serv., Inc.* v. *United States*, 342 U.S. 932 (1952); *Sokol Bros. Co.* v. *Commissioner*, 340 U.S. 952 (1951); and *United States* v. *Beal*, 340 U.S. 852 (1950)). Denial of the petition is even more compelling here because no conflict exists in the lower courts.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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